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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. — 256

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners*,

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

THOMAS F. MURPHY,
Wellsboro, Pennsylvania;
GEORGE I. PUHAK,
Hazelton, Pennsylvania;
CARROLL L. BEEDY,
WARREN E. MAGEE,
PRESTON B. KAVANAGH,
Washington, D. C.;
Attorneys for Petitioners.

August 11, 1943.

PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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STATUTE CITED.

Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, 43 Stat. 938, 28 U. S. C. 344(b) 3

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MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners*,

VS.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT.

Petitioners, Mary S. Whitmore, Robert Simpson, Louise Fillebrown Murtaugh and Sue M. Strous, Executrices of the Estate of Henry Rose, deceased, Edward L. McKenzie; Peoples Pittsburgh Trust Company, Executor of the Estate of C. Louis McKenzie, deceased; Fayette A. McKenzie, John Simpson and Lilly S. Culver, the next-of-kin of Marion S. Siemens, deceased, respectfully pray that a Writ of Certiorari issue to review the decision and judgment of the

Supreme Court of Pennsylvania, Eastern District, entered March 22, 1943, affirming the decree of the Orphans Court of Tioga County, Pennsylvania, dismissing petitioners' contentions and exceptions and adjudicating that Marion S. Siemens died testate as to the residue of her estate, that the trust estate of the decedent blended with and became a part of her individual residuary estate, and that the respondent, The Pennsylvania Society for the Prevention of Cruelty to Animals, a corporation, was entitled to such residuary estate.

The Opinions Below.

The opinion of the Orphans Court of Tioga County dismissing petitioners' petition for a construction of the Will of Marion S. Siemens, deceased (R. 234a-242a) is reported in 42 D. & C. 708.

The opinion of the Orphans Court of Tioga County awarding *nisi* the residue to the respondent (R. 334a-352a) has not been reported.

The opinion of the Orphans Court of Tioga County rejecting petitioners' offer of proof (R. 365a-368a) has not been reported.

The opinion of the Orphans Court of Tioga County overruling petitioners' exceptions and awarding the residue to respondent (R. 442a-459a) has not been reported.

The opinion of the Supreme Court of Pennsylvania (R. 515-518) is reported in 346 Pa. 610.

Jurisdiction.

The opinion and decision of the Supreme Court of Pennsylvania was entered on March 22, 1943 (R. 515-518). A Petition for Rehearing was timely filed on March 30, 1943 (R. 519-524). The Petition for Rehearing was considered and denied by the Supreme Court of Pennsylvania on April 19, 1943 (R. 525). This Court, for good cause shown,

on June 23, 1943, granted petitioners until August 18, 1943 within which to file this Petition for Certiorari (R. 530). The jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 344(b)).

Summary Statement.

This case presents for correction errors of the Orphans Court of Tioga County, erroneously affirmed by the Supreme Court of Pennsylvania, which denied petitioners due process of law and deprived them of a fair trial.

There was general recognition below of the basic proposition of law advanced by petitioners, that where there is *patent* ambiguity because of lack of the certainty required in a will, in the attempt to designate a residuary legatee, the residuary clause is void. The sole judge of the trial court also recognized the long established rule of law to be that extraneous evidence is not admissible upon such ambiguity. He also conceded that there was nothing elsewhere in the will or codicils here involved to throw any light upon the words for which a naked abbreviation was intended by testatrix to stand. In proceedings in the same estate during which each of two societies (one being respondent and the other Women's *Pennsylvania Society for the Prevention of Cruelty to Animals*) was claiming that it was the residuary legatee named by the naked abbreviation, the judge conclusively showed by his orders and opinions that he recognized the ambiguity as *patent*. When petitioners learned of their rights they promptly instituted proceedings for construction in which proceedings they clearly showed their intention when their rights were judicially declared to challenge prior administration orders. *There is nothing in the record to show that the testatrix was aware of respondent's existence or in any way interested in animal welfare.* The interesting and novel ques-

tion presented is whether or not, under such circumstances, a judge may utilize the doctrine of judicial notice to bypass and circumvent the recognized rule of law that judicial notice may not be exercised where the record shows doubt in the mind of the judge.

Further questions are presented of whether or not a state trial court may, under the guise of judicial notice, deprive petitioners of their day in court and their right to produce evidence concerning an abbreviation used by the testatrix in the residuary clause of her will and whether that residue included a separate trust estate.

Marion S. Siemens made her will on September 22, 1936 (R. 12a). On November 30, 1936 she conveyed more than half of her entire estate [1] to Trustees (R. 13a-17a).

The trust instrument reserved power to appoint by will as to the corpus of the trust, but that power was limited to natural "persons", because the trust instrument later distinguishes between persons, partnerships, and corporations (R. 15a).

The trust instrument contained no general provision for disposition of corpus in event of failure to appoint by will, but here also limited the purpose for which corpus should be included in the general estate, on failure to appoint by will, to such inclusion for determination and payment of the trust estate's proportionate share of taxes (R. 16a).

Neither the will (R. 10a) made before, nor three codicils (R. 18a-21a), made thereafter, refer to the trust.

Testatrix died, domiciled in Tioga County, on October 26, 1939, leaving an individual estate exclusive of the trust estate, which was ample to pay debts, all legacies in her will and codicils and leave a substantial residue. Decedent's

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[1] The trust estate was appraised at $396,448.21 (R. 25a, 53a), all cash, stocks and bonds. Her separate individual estate was appraised at $322,511.53, of which $303,401.53 was personalty (R. 25a, 39a) and the balance was realty (R. 25a, 64a-65a).

will and three codicils were probated in the Orphan's Court of Tioga County (R. 23a) on November 6, 1939. The Orphans Court of Philadelphia County (the situs of the trust), on testatrix's death, examined the will of decedent and awarded to the executors of that will, custody of the trust corpus, "same to be held *segregated*[2] from her individual estate and accounted for as a *separate* fund" (R. 22a-24a).

In addition to showing great care in naming many natural persons, the three institutions named reflected even greater care in designation, as testatrix gave lengthy names and the city or town of location in every instance thus: "Vestry and Wardens of St. Pauls Church *of Wellsboro, Pa.*" "The Childrens Country Week Assn. *of Philadelphia*" and "Soldiers & Sailors Hospital *of Wellsboro*" (R. 10a-11a).

The residuary clause, however, was *ambiguous* on its face, in that it contained an abbreviation composed of a contraction of the name of a state followed by four single letters, thus:

> "The residue of the estate to be paid to the *Penna. S. P. C. A.;* requesting that they give all the attention possible to work in Tioga Co."

At the request of respondent the other claimant and the executors a determination of the ambiguity in the residuary clause was deferred, notwithstanding that an early adjudication was necessary for proper administration (R. 86a, 87a).

Petitioners are decedent's next-of-kin and would take in event of intestacy. They are aged and reside in four states. When they learned of the administration proceedings on this estate, and the ambiguity in the residuary clause of the will, they promptly sought a construction of the will (R. 181a).

Both societies claimant filed *identical* demurrers in which each admitted that the residuary clause was ambiguous and

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[2] Italics ours unless otherwise stated.

contended that the residue had been left to a charity and therefore should not be declared void (R. 205a, R. 207a). These societies likewise contended, as other charities might claim under the residuary clause, that the only proper proceeding for a construction of this ambiguity would be one involving notice to all charities who might wish to claim (R. 205a, 207a). The Orphans Court dismissed the application of petitioners for a construction of the will, but in doing so recognized that the residuary clause was ambiguous and concluded that the question of whether the testatrix died intestate as to residue or the residue went to charity "goes to the very core of the ultimate question" (R. 237a).

Petitioners then instituted in the administration cause a proceeding for the construction of the Will and gave notice thereof by publication to all who might claim thereunder (R. 243a). At the scheduled hearing, the Women's *Pennsylvania Society for the Prevention of Cruelty to Animals* withdrew as a claimant in favor of respondent and the judge, who had so recently defined the "core of the ultimate question", and the respondent agreed with each other that, upon further consideration there was nothing in the will upon which to predicate a charitable use. Thereupon, respondent ignored its former admission of ambiguity and asked the Orhpans Court to take judicial notice that the abbreviation in the will "can have only one possible meaning" and offered evidence to sustain its claim.

The Orphans Court, recognizing the long established law of Pennsylvania, which is also the general law of the land, to be that extraneous evidence was inadmissible except to cure a *latent* ambiguity (R. 338a), conceded that there was no *latent* ambiguity (R. 340a) and that there was nothing in the will or codicils to explain the words which the testatrix intended by the abbreviation (R. 334a), nevertheless, admitted and considered (R. 348a) respondent's evidence, over the objections and exceptions of petitioners,

provisionally, and announced that it would later decide whether the evidence was inadmissible and if not admissible would strike it from the record (R. 267a-277a). When the court announced it would consider evidence, petitioners then asked to be permitted to put in evidence on their behalf and in rebuttal (without petitioners abandoning the rights reserved on their exceptions that no evidence was admissible as the ambiguity here involved was *patent*). The Orphans Court refused to allow petitioners to put in any evidence on the ground that any evidence concerning this ambiguity was inadmissible (R. 366a) (ostensibly because the ambiguity was patent) and *thereupon ruled that the court would judicially notice that the abbreviation meant respondent* (R. 366a).

Petitioners' position was, that until the court ruled whether any evidence would be received, they would withhold all evidence concerning the ambiguous residuary clause (R. 359a, 360a, 361a). Without announcing any ruling on the reserved question, the Orphans Court filed its findings of fact, conclusions of law and a decree, awarding nisi the residue of the estate, including in that residue the trust estate of the decedent, to the respondent (R. 331a-352a).

The court took the position that it would not receive "extrinsic evidence to determine to whom the testatrix meant to give" (R. 340a) and then upon the theory that "judicial notice is neither evidence nor proof," (R. 343a) *received respondent's evidence "for the purpose of informing the mind of the court"* (R. 348a) and refused evidence offered by petitioners for that very purpose (R. 366a). Thus the court considered the evidence offered *provisionally* by respondent and *from that evidence* concluded that the abbreviation "Penna. S. P. C. A." was "used by the testatrix to mean the respondent" and awarded *nisi* the residuary estate to it (R. 351a, 252a). Without any evidence whatsoever before it concerning the trust estate, that estate

was included by the Orphans Court as a part of the residue passing to respondent.

Thereupon, petitioners pointed out to the Orphans Court that there was no basis for the finding that the trust estate was a part of the residue passing under the will, as the trust instrument was not before the court, the court had not read it and no evidence had been received concerning it (R. 353a-356a).

Further, petitioners moved to annul the adjudication *nisi* and reopen the hearings, and pointed out to the court that it had received the evidence offered by respondent at the preliminary hearing *provisionally* and had failed to advise petitioners of its ruling on the *reserved* question of law. Hence, petitioners had refrained from offering proofs as to the meaning of the word "residue" in the will and evidence concerning the ambiguous residuary clause and asked that they be permitted to offer proofs in support of their side of the case (R. 358a). In support of this motion, petitioners offered to prove the following facts (R. 363a):

> (1) That there is practically no need within this jurisdiction for the work conducted and carried on by the Pennsylvania Society for the Prevention of Cruelty to Animals, claimant under the will.
>
> (2) That the decedent, Marion S. Siemens, was not interested in animal welfare work, and that she was not interested in animals.
>
> (3) That there are in fact other societies and associations whose initials are "S. P. C. A."
>
> (4) That such charitable interests as the testatrix had were not eleemosynary.
>
> (5) That "Penna. S. P. C. A." was not in fact of such general and public notoriety within the limits of the jurisdiction of this Honorable Court that the average man and woman recognized such an appellation as meaning, or applying to the Pennsylvania Society for

the Prevention of Cruelty to Animals, claimant under the will.

(6) The facts as to the family status and relationship of decedent, her property and her interests and any other matters properly admissible as surrounding circumstances.

The Orphans Court in its opinion refusing petitioners the right to put in any evidence in support of their case or in rebuttal held (R. 365a-366a):

> "* * * we agreed with these petitioners that evidence to show the intent of the testatrix was not admissible, and that if the object of her bounty could not be determined from the four corners of the will, the residuary estate must go to the next-of-kin. Such evidence of the Society claimant (respondent) as was received was for the sole purpose of enlightening the mind of the court as to the meaning of the abbreviation used to aid us in the exercise of our duty to take judicial notice * * *. Evidence to show the intent of the testatrix *would have been rejected if offered* * * *."

The court adhered to its erroneous position that it would judicially notice that the abbreviation meant respondent (R. 368a).

Thus, while respondent was given the opportunity to put in evidence for the "purpose of enlightening the mind of the court," petitioners were denied that right, as they offered to prove (R. 364a) that the abbreviation "was not in fact of such general and public notoriety within the limits of the jurisdiction * * * that every man and woman recognized such an appellation as meaning, or applying to" respondent, and that "there are in fact other societies and associations whose initials are 'S. P. C. A.'."

Petitioners excepted to this action of the court (R. 368a) and again requested opportunity to put on their evidence (R. 369a).

Whereupon, the Orphans Court ruled that it would not vacate the order *nisi* it had entered in favor of respondent and ruled "if there is any error or omission in the findings of fact or conclusions of law, questions with reference thereto may be raised on exceptions before final confirmation" (R. 370a).[3]

Accordingly, in accordance with the ruling of the court, petitioners renewed all of their exceptions and when the case came before the court for final adjudication, renewed their offers of proof and submitted proposed findings in connection therewith (R. 395a-438a). At that final hearing, petitioners' exceptions were overruled and their offers of proof were rejected (R. 458a, 459a). The court adhered to its position that it would judicially notice that the respondent was entitled to the residue of the estate, including therein the trust estate of decedent (R. 442a).

The actions of the trial court clearly show the receipt of evidence offered by respondent and a refusal to hear evidence of petitioners, including evidence which would definitely refute the evidence of the respondent. Hence the decree in favor of the respondent awarding it in excess of $300,000.00 is based upon an incomplete and improper record. Moreover, the trial court seems unquestionably to have taken the position that the ambiguity here involved was *patent*, that *no* evidence would be received as to what the testatrix intended when she wrote the abbreviation, and yet received and considered evidence of respondent and utilized a substitute for evidence, judicial notice, in order to render a decree in respondent's favor. Such a situation clearly presents a denial of due process of law, a denial of

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[3] While the court took the position that petitioners' attempt to prove their side of the case were an "anamaly" (R. 366a) and an attempt "to dally with the processes of the law," on application of the executors and respondent, the court did not hesitate on several occasions to modify its order *nisi* to correct errors and mistakes made on the part of the executors (R. 393a).

a fair trial to petitioners and an illegal adjudication based upon an insufficient, incomplete and improper record. A more subtle method of depriving a litigant of his day in court and a full and fair trial is hard to conceive. Such manifest errors should not be permitted to stand uncorrected and this Court should exercise its supervisory power to prevent the reoccurrence of such an unconstitutional trial in order that the purity of our judicial system may be preserved in the public interest.

On appeal, the Supreme Court of Pennsylvania affirmed the actions of the Orphans Court in awarding the residue to respondent, and thus sanctioned such a departure from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's powers of supervision and correction.

It is significant to note that the Collector of Internal Revenue considered the ambiguous language of the residuary clause of the Will insufficient to establish a bequest to a charity and assessed an additional Federal Estate Tax of $41,724.68 against this estate "on the assumption that the residuary estate will go to the next-of-kin" (R. 394a). If respondent prevails, the United States will be erroneously deprived of Federal taxes totalling $41,728.68, and interest thereon, and at a time when the Nation is in the greatest financial need.

Questions Presented.

1. Whether the procedure and the conduct of the Orphans Court of Tioga County so departed from the accepted and usual course of judicial proceedings that it constituted a denial of due process of law and as such would call for the exercise of this Court's power of supervision.

2. Whether the Supreme Court of Pennsylvania has sanctioned such a departure by the Orphans Court from

the usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

3. Whether, after a ruling to the effect that the ambiguity involved in the residuary clause in the Will in question was *patent* and that no evidence was admissible to establish the intention of the testatrix or to clarify the ambiguity, a court may then take judicial notice of what the testatrix intended in such *patent* ambiguity.

4. Whether a court may take under advisement the question of whether or not in construing an ambiguity in a will, any evidence at all is admissible, receive evidence of the proponent provisionally and then, without affording the right to the other party to produce evidence, accept the evidence *provisionally* received and that supplied by judicial notice, a mere substitute for evidence, and determine the intention of the testatrix according to the whim and caprice of the particular judge hearing the case.

(a) Whether such a practise is such a departure from recognized judicial processes as to amount to a denial of due process of law.

(b) Whether such a determination is not an improper decision based upon an incomplete and improper record and, therefore, a denial of due process of law.

5. Whether petitioners' petitions and motions for an adjudication that the residuary clause was void for *patent* ambiguity should have been granted.

6. Whether in view of the fact that the record disclosed conflicting claims and the possibility of other conflicting claims of persons who might be identified with the abbreviation and letters appearing in the residuary clause and an admitted doubt as to what was intended by the residuary clause, a court by the exercise of judicial notice could

determine that doubt *without any evidence whatsoever concerning the history and background of the testatrix and the facts and circumstances surrounding the making of her will.*

7. Whether it was error and a denial of due process of law to refuse petitioners' offers of proof concerning abbreviation and letters used in the residuary clause of the will.

8. Whether it was error to refuse to receive evidence offered by petitioners concerning the ambiguity involved in the will and then to use evidence (that of respondent and judicial notice) to determine such admitted ambiguity.

9. Whether a state court may decree that a trust estate passes under a will, when the will makes no reference to the trust, the trust instrument is not in evidence and no evidence was received concerning it.

Specification of Errors To Be Urged.

The court below erred:

1. In denying petitioners contentions that the residuary clause of the will in question was void for patent ambiguity.

2. In awarding the residue of decedent's estate to respondent.

3. In including in the residuary estate the trust estate of the decedent.

4. In receiving evidence of respondent.

5. In receiving evidence of respondent to assist the court in determining the meaning of the abbreviation used and in refusing to receive evidence for that very purpose offered by petitioners.

6. In judicially noticing the ultimate fact in issue, the intent of the testatrix, and in judicially noticing that the naked abbreviation used by the testatrix meant respondent.

7. In allowing respondent to offer full proofs and in denying the same rights to petitioners.

8. In sanctioning such a departure on the part of the Orphans Court of Tioga County from the usual course of judicial proceedings as to constitute a denial of due process of law, denial of a fair trial, resulting in an improper decision based upon an incomplete and improper record.

Reasons For Granting the Writ.

Several of the reasons usually advanced for the allowance of a Writ of Certiorari are present in this case. A state court has decided Federal questions of substance under the Constitution in a manner not in accord with the applicable decisions of this Court; has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and on appeal the Supreme Court of Pennsylvania has sanctioned such a departure by a lower court from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, and has not given proper effect to applicable decisions of this Court.

1. Neither the Orphans Court of Tioga County, nor the Supreme Court of Pennsylvania, gave proper effect to the decision of this Court in *Brown* v. *Piper,* 91 U. S. 37, when those courts held that in cases of a patent ambiguity, apparent upon the face of the will, judicial notice could be exercised to resolve such patent ambiguity and in such circumstances of admitted doubt the next of kin are not en-

titled to offer evidence. In the *Brown* case, this Court made it perfectly plain that the exercise of judicial notice is a mere substitute for evidence. In listing situations in which judicial notice may be taken, this Court limited those situations to "facts of universal notoriety" and "whatever is generally known within the limits of a particular jurisdiction." The *Brown* case is no authority for the proposition that the ultimate fact in issue may be judicially noticed in favor of one litigant against another. On the contrary, this Court has made it plain that judicial notice is to be used only as a substitute for evidence concerning universally notorious or generally known facts, and in all events is to be exercised with caution. In that connection, this Court squarely held in the *Brown* case (p. 43);

> "Every reasonable doubt upon the subject should be resolved promptly in the negative."

Not only do the pleadings and the proofs in this case show doubt as to the meaning of the abbreviation in question, but that doubt is established by the court's actions in the case. Thus, in ruling on the first application of petitioners for a construction of the will, the court in its opinion indicated that the language involved could be identified with several "prospective claimants" (R. 235a) and "there is a possibility that some society other than those named may make claim under the will." That clearly manifests the absence of the requisite "notoriety" and the existence of a "reasonable doubt" which precludes the exercise of judicial notice.

Here respondent had and assumed the *burden* of establishing that it was *the* residuary legatee *intended* by the abbreviation (R. 255a). In such a situation, we submit that judicial notice is unavailing to rid respondent of its burden. The rule announced by this Court in *Shapleigh* v. *Mier*, 299 U. S. 468, is of perfect application. There this

Court, after characterizing an attempt to supply the basic fact in issue by judicial notice as an attempt to supply a "crutch on which to lean", held (p. 475):

> "Heed must be given to the *burden of proof,* at least where other tests are lacking, * * * petitioners must recover, if at all, on the strength of their own title. *Judicial notice is unavailing to rid them of that burden.*"

While the decisions below pay "lip service" to the decision of this Court in the *Brown* case, we submit that they did not give proper effect to that decision, are contrary thereto, and the question involved is one of substance concerning the right of a litigant, under the Federal Constitution, to have issues tried in a state court in accordance with the requirements of due process and in a truly judicial manner.

2. Petitioners have been deprived of due process of law contrary to the Fourteenth Amendment because the case has been decided against them without their ever having the opportunity to present their evidence. Such a denial of due process warrants Certiorari. *Saunders* v. *Shaw,* 244 U. S. 317.

When the case came on for hearing in the Orphans Court upon the application of petitioners for a construction of the will, two societies[4] *each* claimed to be the legatee described by the abbreviation in the residuary clause here involved. One society for the prevention of cruelty to animals *"withdrew" in favor of the other* (R. 251a). We submit such action obviously was but a studied attempt on the part of the two societies to eliminate the *patent* ambiguity involved in the abbreviation by eliminating the opposing contentions of the *two* societies having similar names as

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[4] Respondent and the Women's *Pennsylvania Society for Prevention of Cruelty to Animals.*

to what the abbreviation meant. That these societies were collaborating is obvious. Thus prior to this "withdrawal" of one *in favor of the other* they had filed *identical* pleadings (cf. R. 205a with R. 207a).

On the "withdrawal" of the claim of one of the societies for the prevention of cruelty to animals, the other admitted that it had the burden of establishing that it was intended by the abbreviation (R. 255a). It thereupon proceeded to offer evidence (R. 267a). Petitioners objected to any evidence upon the grounds that an abbreviation standing alone could have no meaning; that in the English language in contrast to such language as Chinese, where the single character is comparable to our word, the word is the smallest unit of idea value, and hence whenever an abbreviation is presented the problem is to ascertain the words for which the abbreviation stands; that the problem may be resolved only by the context or setting to suggest the words intended by the testatrix; that the existence of ambiguity was emphasized by the fact that three of the single letters of the abbreviation, "S. P. C.", could stand for "St. Paul's Church", one of the legatees mentioned in the will; that as another specific bequest had been made to a Children's Aid Society, there was some degree of similarity between the abbreviation and the words, "Pennsylvania Society for the Promotion of Children's Aid" or the "St. Paul's Cemetery Association"; that in view of the meticulous care which the testatrix had used to designate specific legatees, it was obvious that there was a patent ambiguity in the residuary clause; that respondent did not offer to explain what words were intended by anything contained in the will or in the circumstances surrounding its execution or by anything connected with the testatrix, thus conceding it was impossible to so ascertain the words intended; that the unquestionable law in Pennsylvania, as well as elsewhere, did not permit the admission of evidence where the

ambiguity was patent; that judicial notice was merely an expedient method for dispending with extraneous evidence to establish an *unquestionable* fact; that the power of the court to exercise judicial notice, under the basic law of the land, could not be tortured into the power to circumvent the taking of evidence concerning disputed facts or to establish the ultimate fact in issue, and that doubt existed concerning the meaning of the words for which the abbreviation stood, which doubt was manifested in all prior activities of the court, the executors and respondent; and, therefore, the court should rule that the ambiguity was *patent* and should decide that the decedent died intestate as to the residue of of her estate, which would dispense with the necessity of deciding whether the trust estate of decedent blended with her individual estate.

Thereupon, the court admitted that there was serious question concerning the admissibility of any of the evidence offered by the respondent and stated that it would take that evidence provisionally and under advisement, and in the event it decided that such evidence was inadmissible, it would be stricken from the record (R. 267a-277a). Relying upon this provisional ruling, petitioners merely offered evidence establishing that they were the next of kin of the decedent.

Thereafter, without informing petitioners of its ruling upon the reserved question of whether or not the ambiguity involved was patent, and whether or not any evidence would be received, the Orphans Court filed its findings of fact, conclusions of law, and entered thereon a decree (R. 331a-352a) holding *nisi* that the respondent was entitled to the residue of the estate and arbitrarily included in that residue the trust estate of the decedent. This action in including the trust estate was obviously taken upon an improper record as the trust instrument had not been offered in evidence and was not before the court for a construction (R. 353a).

Reserving their exceptions, promptly thereafter petitioners sought the right to offer evidence in support of their case and in rebuttal (R. 363a-364a) [5] and in the meantime had procured and filed with the court the trust agreement. The Orphans Court denied petitioners the opportunity to produce any evidence whatsoever or to be heard concerning the trust agreement, and took the position for the first time that petitioners' objections to the receipt of any evidence should be sustained and that no evidence was admissible to establish the meaning of the abbreviation contained in the residuary clause (R. 365a-366a). Thereupon, the Orphans Court refused to receive any evidence pertinent to petitioners' offers of proof and announced that it would *use respondent's evidence to inform the court* and judicially notice that the abbreviation in the residuary clause meant the respondent (R. 366a). On appeal the Orphans Court was affirmed in all respects (R. 518).

As the offers of proof of petitioners unquestionably concerned links in the chain of evidence pertaining to the issues involved, it was prejudicial error for the court to receive evidence on behalf of respondent, *base its decision in respondent's favor entirely upon that evidence*, and then refuse petitioners the opportunity to present *any* evidence under the guise that it based its decision upon judicial notice. *Such procedure is a denial of due process and a sufficient basis for Certiorari. Saunders* v. *Shaw*, 244 U. S. 317, 319; *McCandless* v. *United States*, 298 U. S. 342, 346.

The *Saunders* case involved a procedural situation almost identical with that here involved. In that case this Court said (R. 319):

> The intervening defendant thereupon applied for a rehearing, but the court declined to consider the application under its rule that only one rehearing should

[5] Offer of proof appears at pages 8 and 9, supra.

be granted. He now brings this writ of error and says that he has been deprived of due process of law contrary to the Fourteenth Amendment, because the case has been decided against him without his ever having had the proper opportunity to present his evidence. Technically this is true, for when the trial court ruled that it was not open to the plaintiff to show that his land was not benefited, the defendant was not bound to go on and offer evidence that he contended was inadmissible, in order to rebut the testimony already ruled to be inadmissible in accordance with his view. The Chief Justice and Mr. Justice O'Neill were of opinion that the case should be remanded to the trial court, we presume upon the ground just stated. Probably the majority of the Supreme Court thought that it was so plain on the uncontroverted facts that the case was within the principal of *The Myles Salt Company's Case* that to remand it would be an empty form—a mere concession to technicality. It may turn out so, but we do not see in the record an absolute warrant for the assumption and therefore cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in.

This Court made it perfectly plain in the *Saunders* case that a denial of the rights given by the Fourteenth Amendment need not be by legislation and can arise from the actual conduct of a judicial proceeding in a state court. In such a situation this Court said that there would be a serious gap in the remedy for an infraction of constitutional rights if the parties aggrieved in such a way could not come to this Court.

In reversing a rejection of an offer of proof in the *McCandless* case, this Court held (R. 346):

> "If it be an appropriate *link* in the chain of proof, that is enough. * * * (p. 347) the well settled rule (is) that an erroneous ruling which relates to the substantial rights of a party is ground for reversal * * *."

This Court then ruled (p. 348) that the rejection of the offer of proof made in the *McCandless* case "could not be otherwise than prejudicial." A comparison of the offer made there with that here will demonstrate that petitioners were prejudiced and denied a fair trial below.

We submit that the actions of the Orphans Court in this case, which were sanctioned and approved by the Supreme Court of Pennsylvania, deprived petitioners of due process of law, contrary to the Fourteenth Amendment, and should be reviewed by this Court.

3. The decision of the Orphans Court and the affirmance of that decision by the Supreme Court of Pennsylvania, were based upon improper records and, therefore, represent such a departure from the accepted and usual course of judicial proceedings as to constitute a denial of due process of law guaranteed by the Fourteenth Amendment, and as such call for the exercise of this Court's power of supervision and correction. Regular judicial proceedings do not contemplate a decision of the utlimate issue in a case before the evidence of all the parties is before the court. As the court in this case took under advisement the question of the admissibility of any evidence, it certainly should not reach a decision predicated upon the evidence of respondent alone, when the petitioners were not afforded the opportunity to present their evidence.

This Court has made it plain that it will not tolerate a "procedure" and "course of litigation" in a state court that does not satisfy the "requirements of due process" guaranteed by the Constitution. *Hansberry* v. *Lee*, 311 U. S. 32, 43, 44.

In the *Hansberry* case this Court granted certiorari to review (p. 38) and reviewed and reversed a "res adjudicata" ruling of a state court, purporting to bind "class"

members, on the ground the "class" members, who did not appear did not have "representation," had not been heard and held (p. 45):

> "Apart from the opportunities it would afford for the fraudulent and collusive sacrifice of the rights of absent parties, we think that the representation in this case no more satisfies the requirements of due process than a trial by a judicial officer, who is in such situation that he may have an interest in the outcome of the litigation in conflict with that of litigants. *Tumey* v. *Ohio*, 273 U. S. 510."

Thus, where a party is not present and has not put in his evidence, a judgment against such a party would not satisfy the requirements of due process. It follows that, *if present*, yet a party is *denied the opportunity to present his evidence*, a judgment against such a party likewise would not satisfy the requirements of due process.

Petitioners were not bound to contemplate a decision of this case, solely upon the evidence of respondent or under the guise of judicial notice, before their evidence was heard. *Saunders* v. *Shaw*, 244 U. S. 317, 320.

If any evidence is to be received to aid the court in determining the intent of the testatrix in using the abbreviation in question, we submit that the basic concept of a constitutional judicial proceeding contemplates that the evidence of petitioners be received, as well as the evidence of respondent. This Court so held in the *Saunders* case.

We think it beside the point for the court to state that no evidence was admissible to aid the court in determining the ambiguity involved and then to state it could judicially notice the ultimate fact in issue, the reason being that if no evidence was admissible to aid the court in determining the intent of the testatrix, the ambiguity is *patent* and,

therefore, the bequest is void for uncertainty and the residue of the testatrix's individual and trust estate should have been awarded to petitioners as her next of kin.[6]

This Court has strongly condemned as a denial of due process of law decisions based upon improper records, such as the record here involved, where all relative evidence is not before the court, particularly where such evidence has not been produced because of some ruling in the trial court. *Lutcher & Moore Lumber Co.* v. *Knight*, 217 U. S. 257, 267; *Saunders* v. *Shaw*, 244 U. S. 317; *Duke Power Co.* v. *Greenwood County*, 299 U. S. 259, 268; *U. S.* v. *Rio Grande Dam & Irrigation Co.*, 184 U. S. 416, 423, 424; *Willing* v. *Binenstock*, 320 U. S. 272, 277. The Circuit Courts of Appeal repeatedly have recognized the rule so clearly enunciated by this Court[7] and its infraction here is so flagrant as to call for the exercise in the public interest of the supervisory and remedial powers of this Court.

The argument that as the residue is left to charity, intestacy is defeated, is specious as the respondent and the trial judge agreed (R. 266a) and the trial judge so found (R. 452a). There is nothing in the residuary clause to show the bequest is to charity. The legatee vainly attempted therein to be named is designated by a naked abbreviation, void for *patent* uncertainty; hence the attempt to inject into

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[6] *Torbet* v. *Twining*, 1 Yeates 432, 439; *McDermott* v. *U. S. Insurance Co.*, 3 S. & R. 603, 606; *Iddings* v. *Iddings*, 7 S. & R. 111, 113; *Ritter* v. *Fox*, 6 Wharton 99, 107; *Comfort* v. *Mather*, 2 W. & S. 450, 453; *Trustee* v. *Sturgeon*, 9 Pa. 321, 327-328; *Kelley* v. *Kelley*, 25 Pa. 460, 462; *Brooklyn Trust Co.* v. *Warrington*, 277 Pa. 204, 208; *Hughes's Estate*, 319 Pa. 326, 329, and see *Clayton* v. *Nugent*, 13 Mees. & W. 200, 153 Eng. Reprint 83.

[7] *Fifth Third National Bank* v. *Johnson*, 219 F. 89, 95; *Columbus Gas & Fuel Co.* v. *City of Columbus*, 55 F. 2d 56, 57; *Faulks* v. *Schrider*, 99 F. 2d 370, 373; *Hughes* v. *Reed*, 46 F. 2d 435, 442, 443; *Wilson* v. *Spencer*, 261 F. 357, 368; *Underwood* v. *Comm. of Internal Revenue*, 56 F. 2d 67, 72, 73; *Finefrock* v. *Kenova Mine Car Co.*, 22 F. 2d 627, 634; *Hamilton Gas Co.* v. *Watters*, 75 F. 2d 176, 182.

the case the contention that the bequest is to charity is without merit and may be characterized as an attempt on the part of respondent and the courts below to lift the case by its proverbial "boot straps."

Conclusion.

It is respectfully submitted that this Petition for Certiorari to bring before this Court the decision and judgment of the Supreme Court of Pennsylvania, Eastern District, should be granted.

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August 11, 1943.

(10)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 256.

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. McKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS McKENZIE, DECEASED; FAYETTE A. McKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED;

Petitioners,

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, a Corporation,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943 No. 256

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners,*

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

OPINIONS OF THE COURTS BELOW.

The opinion of the Supreme Court of Pennsylvania affirming the decree of the Orphans' Court of Tioga County is reported in 346 Pa. 610. It is dated March 22, 1943.

The adjudication and opinion of the Orphans' Court of Tioga County, dated March 14, 1942, is unreported. It appears at page 331a of the record.

The opinion of the Orphans' Court of Tioga County on the petitioners' motion to open the adjudication is unreported and appears at page 365a of the record.

The opinion of the Orphans' Court of Tioga County on the petitioners' exceptions to the adjudication is unreported and appears at page 442a of the record.

The final decree of the Orphans' Court of Tioga County awarding distribution is dated July 13, 1942, and appears at page 460a of the record.

The opinion of the Orphans' Court of Tioga County dismissing the petitioners' petition for declaratory judgment is dated November 15, 1941, and is reported in 42 Penna. D. & C. Reports, page 708.

JURISDICTION.

The opinion of the Supreme Court of Pennsylvania was filed March 22, 1943, and the petition for rehearing was filed by the petitioners March 30, 1943, and was denied April 19, 1943.

On the application of the petitioners an order was entered by this Court on June 23, 1943, extending until August 18, 1943, the time within which the petition for certiorari might be filed.

Jurisdiction of this Court is claimed by the petitioners under Sec. 237 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938, 28 U. S. C. 344 (b)).

STATEMENT OF THE CASE.

Marion S. Siemens, a widow, died a resident of Wellsboro, Tioga County, Pennsylvania, on October 26, 1939 (R. 331a), leaving as her next of kin certain cousins. By her will, dated September 22, 1936 (R. 10a), and by three codicils, one undated (R. 19a), and the others dated February 1, 1937 (R. 18a) and October 23, 1939 (R. 20a), respectively, she appointed Charles G. Webb, Esq., of Wellsboro, and the Girard Trust Company of Philadelphia executors. After making certain charitable bequests she bequeathed to relatives and others a total of over $200,000., and then bequeathed the residue of her estate to "the Penna. S.P.C.A.; requesting that they give all the attention possible to work in Tioga Co."

Her will was probated November 6, 1939. The executors filed their first and partial account October 26, 1940. It was confirmed *nisi* November 25, 1940, and finally December 9, 1940.

The Orphans' Court of Tioga County appointed Frank S. Hughes, Esq., auditor January 27, 1941. He filed his report March 8, 1941. It was confirmed *nisi* March 10, 1941, and finally March 22, 1941 (Docket entries, R. 3a).

On July 31, 1941, some of the next of kin filed in the Orphans' Court a petition for a declaratory judgment to construe the will (R. 181a), alleging that there is a patent ambiguity upon the face of the will in that it fails to designate with the certainty required any object for the residuary estate. They asked that the

will be declared void as to the residuary estate and that the testatrix be declared to have died intestate as to her residuary estate.

Answers in the nature of demurrers were filed, raising questions of law and alleging that there was no proper subject for a declaratory judgment, and that the question of who was entitled to the residuary estate was ripe for determination by the Auditing Judge upon the audit of the executors' account.

The Orphans' Court filed an opinion November 15, 1941 (R. 234a), dismissing the petition for the declaratory judgment.

On October 25, 1941, the second and final account of the executors was filed, which was confirmed *nisi* November 24, 1941, and finally December 13, 1941.

On December 20, 1941, some of the next of kin filed a petition asking that the Orphans' Court fix a date for the hearing and determination of the rights of all persons entitled to share in the distribution of the residuary estate (R. 243a).

The hearing was held January 29, 1942, before Honorable Thomas A. Crichton, President Judge of the Orphans' Court (R. 248a).

At the hearing the respondent filed a formal claim to the residuary estate (R. 252a), alleging that it was the corporation named as the residuary legatee in the will.

The respondent urged that the Court should take judicial notice of the meaning of the abbreviation used by the testatrix "the Penna. S.P.C.A."

The respondent also offered substantial testimony and evidence as to its identity. The respondent also urged that under the law of Pennsylvania, irrespective of whether the respondent had established its identity as the residuary legatee, the next of kin had no standing to claim the residuary estate as the abbreviation S.P.C.A. clearly meant some charity, and a bequest to a charity would not be allowed to fail for want of a trustee.

The next of kin offered evidence to prove their relationship to the testatrix, but offered no further evidence, and their counsel stated that they had no further evidence to offer (R. 308a).

On March 14, 1942, the Orphans' Court filed its adjudication consisting of an opinion, findings of fact and conclusions of law (R. 331a-352a), finding as a fact (No. 9, R. 333a) that the decedent died testate as to her residuary estate bequeathing it to the Pennsylvania Society for the Prevention of Cruelty to Animals, the claimant there and the respondent here.

The Orphans' Court also filed a conclusion of law that the residuary estate should be awarded to the Respondent (R. 352a), and on March 14, 1942, ordered a schedule of distribution to be submitted on behalf of the executors.

On March 17, 1942, the next of kin filed a petition to cancel and annul the adjudication (R. 358a). It was refused March 28, 1942 (R. 368a).

A motion by the next of kin to set aside the adjudication (R. 369a) was overruled March 30, 1942 (R. 370a).

On March 30, 1942, the Orphans' Court confirmed the schedule of distribution *nisi,* making minor corrections.

On petition filed by the executors to correct certain figures (R. 377a) an amended decree *nisi* was entered April 27, 1942 (R. 393a).

On May 8 and 11, 1942, the next of kin filed exceptions to the adjudication (R. 395a, 397a), and on May 29, 1942, a motion to open the adjudication and additional exceptions (R. 439a).

The additional exceptions being allowed (R. 441a), the Orphans' Court on July 13, 1942, filed an opinion modifying certain findings, immaterial to the matter here involved (R. 442a), and entered a final decree confirming the adjudication and schedule of distribution as thus modified (R. 460a).

The next of kin appealed to the Supreme Court of Pennsylvania which affirmed the decree of the Orphans' Court.

The decedent, Marion S. Siemens, had executed a deed of trust, dated November 30, 1936, transferring to trustees certain securities in trust to pay the net income to her for life, and upon her death to pay over and distribute the principal to such persons as she by her last will and testament should direct, limit and appoint (R. 13a).

After her death the surviving trustee and the executors of a deceased trustee filed their account in the Orphans' Court of Philadelphia County, and that Court on December 6, 1939, awarded the balance to Mrs. Siemens' executors, to be segregated from her

individual estate and accounted for by them as a separate fund. The Orphans' Court held that this trust fund passed under her will as a part of her estate. This holding was made in an opinion filed on motion of the next of kin to open the adjudication (R. 367a).

ARGUMENT.

SUMMARY.

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1. The Proceedings in the Orphans' Court of Tioga County.

(*a*) The Executors' First Account.

(*b*) The Executors' Second Account.

(*c*) The Assertion of the Claim by the Next of Kin.

(*d*) The Hearing Held on the Petition of the Next of Kin.

(*e*) The Claims of the Petitioners and of the Respondent at the Hearing and the Decision of the Court Thereon.

2. The Petitioners Had Full Opportunity to be Heard in the Orphans' Court.

3. The Orphans' Court and the Supreme Court of Pennsylvania Correctly Construed the Will.

4. No Federal Question is Presented.

5. Errors in Petitioners' Summary Statement of Facts.

6. Conclusion.

1. The Proceedings in the Orphans' Court of Tioga County.

In Pennsylvania jurisdiction over the estates of decedents and the accounts of executors is in the Orphans' Court. Act of June 7, 1917, Pamphlet Laws, 366, Section 9 (e) and (l). The Act provides that the jurisdiction of the Orphans' Court shall extend to and embrace:

> "(e) The distribution of the assets and surplusage of the estates of decedents among creditors and others interested; * * *
>
> (l) All cases within their respective counties, wherein executors, administrators, guardians, or trustees may be possessed of, or are in any way accountable for, any real or personal estate of the decedent;"

In the larger counties there are separate Orphans' Courts. In the smaller counties the Orphans' Court is held by the judge or judges of the Court of Common Pleas.

In Tioga County there is only one judge and he holds the Orphans' Court.

Accounts of executors are filed with the Register of Wills and notice of the filing given by advertisement. The notice states that the accounts will be presented to the Orphans' Court for confirmation at a certain time and place.

It is the practice in Tioga County, there being no separate Orphans' Court, for the Court to confirm all accounts if no exceptions are filed, and if desirable then to appoint an auditor to make distribution.

(*a*) THE EXECUTORS' FIRST ACCOUNT.

The docket entries (R. 2a) show that the executors' first and partial account, filed October 26, 1940, was referred to an auditor on December 14, 1940, the order appearing in the record at page 58a.

The auditor held extensive hearings, reported that partial distribution should be made, recommended the payment of the pecuniary legacies and certain claims, and ordered that the balance remain in the hands of the executors (R. 169a).

The docket entries (R. 3a) show that on July 31, 1941, the next of kin, the petitioners here, filed their petition for a declaratory judgment (R. 181a), which was dismissed (R. 242a) on the ground that the questions raised should be decided in the usual manner as provided by statute upon the audit of the final account (R. 242a).

(*b*) THE EXECUTORS' SECOND ACCOUNT.

In the following November (R. 4a) the executors filed their second and final account which was confirmed.

(*c*) THE ASSERTION OF THE CLAIM BY THE NEXT OF KIN.

On December 20, 1941 (R. 4a), the petitioners filed their petition for a hearing (R. 243a) asking the Orphans' Court to determine the rights of all persons entitled to share in the distribution of the residuary estate.

(*d*) The Hearing Held on the Petition of the Next of Kin.

Pursuant to this petition the Court on December 20, 1941 (R. 246a) entered a decree fixing the hearing for January 22, 1942, and ordering publication of the notice. The time for the hearing was changed to January 29, 1942 (R. 5a).

The proceedings before the auditor with reference to the first and partial account of the executors having to do only with questions relating to the pecuniary legacies and miscellaneous questions not involving the distribution of the residuary estate, all questions concerning the disposition of the residuary estate were before the Court at the hearing on January 29. Counsel appeared for the next of kin and testimony was taken to establish their relationship (R. 249a).

(*e*) The Claims of Petitioners and of the Respondent at the Hearing and the Decision of the Court Thereon.

The next of kin of the decedent, the petitioners here, claimed in the Orphans' Court that the residuary clause of the will contained a patent ambiguity. This claim of necessity amounted to an assertion that the abbreviation "the Penna. S.P.C.A." is meaningless and that as it is impossible to ascertain what it does mean, the Court should declare the residuary bequest void for uncertainty, find that the decedent died intestate as to her residuary estate, and that it descended to her next of kin under the intestate laws.

They offered no evidence as to the meaning of the residuary clause of the will or to rebut the evidence offered by the respondent, although they had full opportunity to do so.

The respondent filed a formal claim to the residuary estate setting forth that it was incorporated by the Act of April 4, 1868, Pamphlet Laws, 655, under the name of the Pennsylvania Society for the Prevention of Cruelty to Animals, and that it is well and widely known by the abbreviation "Penna. S.P.C.A." At the hearing the respondent presented three propositions:

1. That the Court should take judicial notice of the meaning of the abbreviation.

2. That the proof submitted established the identity of the respondent as the residuary legatee.

3. That even if judicial notice of the meaning of the abbreviation were not taken, and even if the proof as to the respondent's identity were not conclusive, nevertheless the next of kin had no standing to claim the residuary estate once it was admitted that the abbreviation "S.P.C.A." meant some society for the prevention of cruelty to animals.

The third proposition was based on the Pennsylvania law that a gift to charity will not be permitted to fail for want of a trustee and on the fact that the courts of Massachusetts, California, New York

and New Jersey, and the lower courts of Pennsylvania had held that a gift to a society for the care of animals is a charity. That such a society is a charity:

Massachusetts Society for the Prevention of Cruelty to Animals v. *City of Boston, 142 Mass. 24 (6 N. E. 840);*
Minns v. *Billing, 183 Mass. 126 (66 N. E. 593, 5 L. R. A. N. S. 686);*
Coleman's Estate, 167 Cal. 212 (138 Pac. 992);
Title Guarantee & Trust Company (Hamilton's Will), 165 N. Y. Supp. 71;
Pitney v. *Bugbee, 98 N. J. L. 116 (118 Atl. 780);*
Lockhart's Estate, 21 Pa. D. & C. 598;
Ammon's Estate, 72 Pitts. (Pa.) L. J. 872.

That a charity can never fail either because it is indefinite or for want of a trustee:

Hunter's Estate, 279 Pa. 349;
Thompson's Estate, 282 Pa. 30;
Darlington's Estate, 289 Pa. 297;
Mears's Estate, 299 Pa. 217.

While not devoting much of its opinion to this third proposition the Orphans' Court agreed with it.

At the hearing in the Orphans' Court the respondent offered in evidence various encyclopedias, dictionaries and reference works, in all of which the abbreviation "S.P.C.A." was defined as meaning Society for the Prevention of Cruelty to Animals (R. 294a).

They were offered not only to inform the mind of the Court and to assist the Court in taking judicial notice of the abbreviation, but as affirmative proof of the respondent's identity.

The respondent also offered other proof of its identity, being photographs, signs, badges and newspaper clippings, showing that it was known by the abbreviation "Penna. S.P.C.A." (R. 267a-293a). These were as follows:

Exhibit 1. Photograph of a lamp-post in front of the respondent's former building, marked "S.P.C.A."
Identified R. 270a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 2. Photograph of front of respondent's present headquarters in 1917, marked "The Penna. S.P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 3. Photograph of respondent's water truck, marked "The Penna. S.P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 4. Photograph of respondent's water truck, marked "The Penna. Society P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 5. Photograph of respondent's horsedrawn truck, marked "The Penna. Society P.C.A."
Identified R. 271a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 6. Photograph of respondent's three Ford cars, marked "The Pennsylvania S.P. C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 7. Photograph of respondent's animal ambulance, marked "The Pennsylvania S.P.C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 8. Photograph of respondent's former headquarters, marked "Penna. Society P.C.A."
Identified R. 272a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 9. Photograph of respondent's water truck, marked "The Penna. S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 10. Photograph of sign at respondent's clinic, marked "The Pennsylvania S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 11. Photograph of sign in passageway to respondent's clinic, marked "The Penna. S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 12. Photograph of Directory Board at respondent's headquarters, marked "The Pennsylvania S.P.C.A."
Identified R. 273a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 13. Photograph of three animal ambulances, marked "The Pennsylvania S.P.C.A."
Identified R. 274a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 14. Photograph of respondent's animal ambulance, marked "The Pennsylvania S.P.C.A."
Identified R. 274a. Offered R. 274a. Admitted R. 278a, 291a.

Exhibit 17. Respondent's metal sign for use on buildings where animals are housed, marked "Penna. S.P.C.A."
Identified R. 280a. Offered R. 280a. Admitted R. 280a.

Exhibit 20. Uniform cap used by respondent's drivers, marked "Penna. Society P.C.A."
Identified R. 287a. Offered R. 287a. Admitted R. 287a.

Exhibit 22. 2 volumes of newspaper clippings showing the respondent frequently referred to as "The Penna. S.P.C.A."
Identified R. 291a. Offered R. 292a. Admitted R. 292a.

8 dictionaries, encyclopedias and reference works, defining S.P.C.A. as meaning "Society for the Prevention of Cruelty to Animals."
Offered R. 294a. Admitted R. 297a.

They are referred to in detail in the adjudication of the Orphans' Court (R. 348a, 349a).

The next of kin, all of whom were there represented by counsel, offered no evidence as to the meaning of the abbreviation or on any other subject except their relationship to the testatrix, and at the conclusion of the hearing it was definitely stated by their counsel: *"We have no more evidence"* (R. 308a). Their counsel made an elaborate argument endeavoring to convince the court that the will contained a patent ambiguity. The record of the hearing on January 29, 1942 (R. 308a), shows that at the conclusion of the testimony and argument it was closed. Shortly afterwards further hearings were held for the purpose of admitting a deposition as to certain of the next of kin, and to permit the executors to make a statement about taxes (R. 308a and 316a). At this hearing counsel for the petitioners stated that he would like to have his appearance for an additional party noted and get it in the record "while it is open," thus evidencing his realization that the hearing was being closed (R. 317a).

Although the usual practice in the Orphans' Court is for the losing party to file exceptions to the adjudication, the next of kin first filed a petition to annul the adjudication (R. 358a) and when this was refused (R. 368a) filed a motion to set it aside, which also was refused (R. 370a). *It was in this petition to annul the adjudication that, for the first time, the petitioners alleged that they had not had an opportunity to offer*

evidence as to the meaning of the residuary clause of the will (R. 361a).

They then filed 109 exceptions to the adjudication, and later 5 more, or 114 in all (R. 397a-441a). The Court modified certain of its findings, immaterial here, dismissed the exceptions, and confirmed finally the adjudication on July 13, 1942 (R. 460a).

On appeal to the Supreme Court of Pennsylvania by the next of kin that Court held that the Orphans' Court was justified in taking judicial notice of the meaning of the abbreviation, and affirmed the decree awarding the residuary estate to the respondent (346 Pa. 610).

2. The Petitioners Had Full Opportunity to be Heard in the Orphans' Court.

The next of kin had a full and fair hearing in the Orphans' Court. The Court, of its own volition, might have taken judicial notice of the meaning of the abbreviated corporate name of the respondent. But the respondent offered evidence of the meaning of the abbreviation and affirmative proof of the respondent's identity.

Insofar as the dictionaries, encyclopedias and reference books, to which the Court was referred, are concerned, they were offered in evidence and were physically present at the hearing and were available to the petitioners. They were not withheld from the record. Compare *Ohio Bell Telephone Co.* v. *Commissioner, 301 U. S. 292, p. 301.*

The badges, labels, photographs and newspaper clippings offered to prove that the respondent frequently is known by the abbreviation "The Penna. S.P.C.A." were offered in evidence, were physically in Court, were available to the next of kin, and are Exhibits in this case. Every requirement of due process of law was observed by the Orphans' Court. They had a full opportunity to be heard, not only before a decree was entered (*Wilson* v. *Standefer, 184 U. S. 399, p. 415*), but at the same time as the respondent's claim was heard, and at the time set on their own petition for a hearing of their case. The proceedings which the petitioners invoked were conducted according to the law of Pennsylvania and the rules of the Court in which the hearing was held. *Thompson* v. *Nichols, 254 Fed. 973, p. 986.*

No federal question was raised by the petitioners at the hearing or thereafter, until they came to file exceptions to the Court's adjudication. Out of 114 exceptions filed, 2 raised the question of due process of law, Nos. 100 and 101 (R. 435a-436a).

In the Supreme Court of Pennsylvania the petitioners filed 58 assignments of error, in only one or possibly two of which was the issue of due process of law raised.

The Orphans' Court of Tioga County in passing upon the petitioners' motion to open the adjudication (R. 366a) said:

> "Furthermore, the next of kin had every opportunity to offer evidence in support of their

claims. Evidence to show the intent of testatrix would have been rejected if offered, but the forum was open to them for that purpose if they cared to do so. It was clearly understood at the close of the hearing that all evidence was in, although later, and before the filing of the adjudication, it was opened to allow these petitioners to present further testimony as to their identity. Without averring the existence of newly discovered admissible evidence they now seek to open again for the apparent purpose of showing intent, although they strenuously contended at the argument that such testimony is inadmissible. We agreed with them then, and have not changed our opinion.

It would be an anomaly indeed were we to decide, as we have, that the meaning of the will is obtainable from its face, and then proceed to open an adjudication based on that meaning for the purpose of admitting testimony to show that testatrix did not mean what we found she said."

And in overruling the exceptions of the petitioners (R. 447a), the Court said:

"Exceptants had every opportunity at the hearing to offer any evidence that they deemed pertinent. Instead of doing so they objected to the admission of evidence by any claimant on the ground that there is in the will a patent ambiguity. (See page 7 of notes of testimony.) It was not until after the adjudication had been made that these exceptants petitioned the court

to open the matter and allow them to offer evidence on the question of identity of the Society claimant, founding the petition upon the untenable proposition that they were not bound to offer evidence until the court had determined that it would take judicial notice of the meaning of the term "Penna. S.P.C.A." We believe the petition was properly refused."

3. The Orphans' Court and the Supreme Court Correctly Construed the Will.

Text books and state and federal decisions sustain the right of a court to take judicial notice of abbreviations and other subjects:

> "Another common class of instances, subject to the foregoing general considerations * * * is that of the meanings of words and phrases and written symbols. So far as these are notorious and unquestioned, they are constantly found noticed."
>
> *Wigmore, Evidence, Third Edition, Volume IX, Section 2582.*

Gilman v. *Sheets, 78 Iowa 499 (43 N. W. 299);* judicial notice taken that "Dauphin Co., Pa." meant "Dauphin County, Pennsylvania."

Nix v. *Hedden, 149 U. S. 304;* judicial notice taken, after reference to a dictionary, that tomatoes are vegetables, not fruits.

Brown v. *Piper, 91 U. S. 37, p. 42;* judicial notice taken as to a freezing process in a claim to a patent for preserving fish and meats.

And several state and federal decisions are illustrative of proof being received to identify a legatee where the description in the will is slightly different from the corporate title:

Kimmel v. *Wagner, 1 Walker (Pa.) 191;* a devise to the "German Eldership" awarded to "The German Eldership of the Church of God."

Newell's Appeal, 24 Pa. 197; a devise "To the trustees, or those who hold the funds of the Theological Seminary at Princeton, State of New Jersey" awarded to the "Trustees of the Theological Seminary of the Presbyterian Church."

State Trust Company v. *Pierce, 126 Maine 67 (136 Atl. 289);* a bequest to "The Maine State Society for the Prevention of Cruelty to Animals, which Society is located at Portland, Maine" awarded to "The Maine State Society for the Protection of Animals."

Speer v. *Colbert, 200 U. S. 130, p. 142;* a bequest to "University of Georgetown" awarded to "The President and Directors of Georgetown College."

4. No Federal Question is Presented.

The Orphans' Court and the Supreme Court of Pennsylvania proceeded, in accordance with the state laws and practice, to construe the decedent's will. At the hearing the petitioners were represented by

counsel. After a full hearing the Pennsylvania Courts awarded the residuary estate to the respondent. Even if this decision were wrong, no Federal question is present:

Arrowsmith v. *Harmoning, 118 U. S. 194;*
Central Land Company v. *Laidley, 159 U. S. 103, p. 112;*
Iowa Central Railway Company v. *Iowa, 160 U. S. 389, pp. 393-394;*
American Railway Express v. *Kentucky, 273 U. S. 269, p. 273.*

5. Errors in Petitioners' Summary Statement of Facts.

The claim of the petitioners to their right to be heard in this court is based solely upon their allegation that they were denied a full and fair hearing and deprived of an opportunity to introduce evidence on their behalf. The entire record shows the contrary.

Many of the statements in the petition are erroneous and carry a false implication. The following are examples:

(*a*) On page 7 of the petition it is stated:

"When the court announced it would consider evidence, petitioners then asked to be permitted to put in evidence on their behalf and in rebuttal (without petitioners abandoning the rights reserved on their exceptions that no evidence was admissible as the ambiguity here involved was *patent*)."

The implication from this statement is that at the hearing, which was held for the purpose of receiving all evidence to be offered by the parties, the petitioners asked and were not permitted to introduce evidence as to the meaning of the residuary clause. The record shows the contrary. At the conclusion of the hearing, counsel for the petitioners stated:

"We have no more evidence" (R. 308a);

and at a subsequent hearing held for the purpose of permitting the executors to make a statement relative to taxes, counsel for the petitioners, stating that he appeared for John Simpson and that he wished that to be noted, referred to the fact that he would like to have his appearance

"in the record while it is open."

It was not until after the court's adjudication, opinion and findings had been filed that any question was raised by the petitioners as to the introduction of evidence with respect to the meaning of the residuary clause of the will. This question was raised for the first time in the irregular proceedings taken by the petitioners when they filed their petition to annul the adjudication (R. 361a).

(*b*) On page 7 of the petition, it is said:

"The Orphans' Court refused to allow petitioners to put in any evidence on the ground that any

> evidence concerning this ambiguity was inadmissible (R. 366a) (ostensibly because the ambiguity was patent) and *thereupon ruled that the court would judicially notice that the abbreviation meant respondent* (R. 366a)."

This statement is incorrect. As above set forth, it was not until after the hearing had been closed and the adjudication and opinion filed that the petitioners belatedly indicated their desire to introduce any evidence concerning the residuary clause of the will. Moreover, the court did not "thereupon" rule that judicial notice would be taken of the meaning of the abbreviation. This ruling was made *before* the petition to annul was filed and is set forth fully in the adjudication (R. 331a).

(*c*) Again, it is said on page 7 of the petition:

> "Petitioners' position was, that until the court ruled whether any evidence would be received, they would withhold all evidence concerning the ambiguous residuary clause."

There is not the slightest indication in the notes of testimony of the hearing showing that this was the petitioners' position. They refer to pages 359a, 360a and 361a of the record, which pages refer, not to any position they took at the hearing before the Orphans' Court, but to allegations in their petition to annul the adjudication filed *after* the court had decided the case.

(*d*) It is further said, on page 7:

> "Without announcing any ruling on the reserved question, the Orphans Court filed its findings of fact, conclusions of law and a decree, awarding nisi the residue of the estate, including in that residue the trust estate of the decedent, to the respondent."

An examination of the notes of testimony at the hearing (R. 248a) shows no question reserved by the court, except the right to strike out evidence received which the court might later determine to be inadmissible.

(*e*) On page 8 it is stated that the petitioners, in their petition to annul the adjudication and reopen the hearings, "pointed out" to the court that the evidence offered by the respondent had been received "provisionally" at the "preliminary hearing," and that the petitioners had not been advised of the court's ruling on the "reserved question of law." The hearing was not "preliminary," but was the one and only hearing held for the purpose of receiving any and all evidence that any party or claimant desired to offer. The respondent's evidence was not received "provisionally," nor did the petitioners refrain from offering evidence because the hearing was "preliminary" or because the respondent's evidence was offered "provisionally."

(*f*) On page 6, it is said that the Orphans' Court dismissed the application of the petitioners for a

declaratory judgment, but that in doing so, it recognized that the residuary clause was ambiguous. There is nothing in the record to show that in those proceedings the court in any way indicated that the residuary clause of the will was ambiguous.

(*g*) In the second paragraph, page 6, it is said that at the hearing "the judge * * * and the respondent" agreed with each other that there was nothing in the will upon which to predicate a charitable use. The record fails to disclose any such "agreement" or any statement either by the judge or the respondent to that effect.

These are but examples. Some of the erroneous statements are repeated in other parts of the petition. In view of what the record shows and the full opportunity afforded to the petitioners to present at the hearing any evidence that they desired, it is difficult to understand an allegation such as that contained on page 16, paragraph 2, that they were deprived of due process of law because the case was decided against them "without their ever having the opportunity to present their evidence."

6. Conclusion.

It is obvious that no federal ground adequate to support the petition exists, the construction of the will being a local question and the decision of the court being on the construction of that will.

Compare *Bilby* v. *Stewart, 246 U. S. 255, p. 257.*

The petitioners chose not to offer any evidence at the hearing in the Orphans' Court to prove that the

abbreviation "the Penna. S.P.C.A." meant something other than the corporate title of the respondent. They were afforded every opportunity to do so. It may be assumed that the reason they did not was because they had no such evidence.

The action of the court in refusing to open the adjudication and to let them do so later does not raise a federal question.

American Surety Co. v. *Baldwin, 287 U. S. 156, p. 168.*

The respondent respectfully asks that the petition for a certiorari be denied.

Respectfully submitted,

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Office - Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. 256

MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. McKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS McKENZIE, DECEASED; FAYETTE A. McKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners,*

vs.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

THOMAS F. MURPHY,
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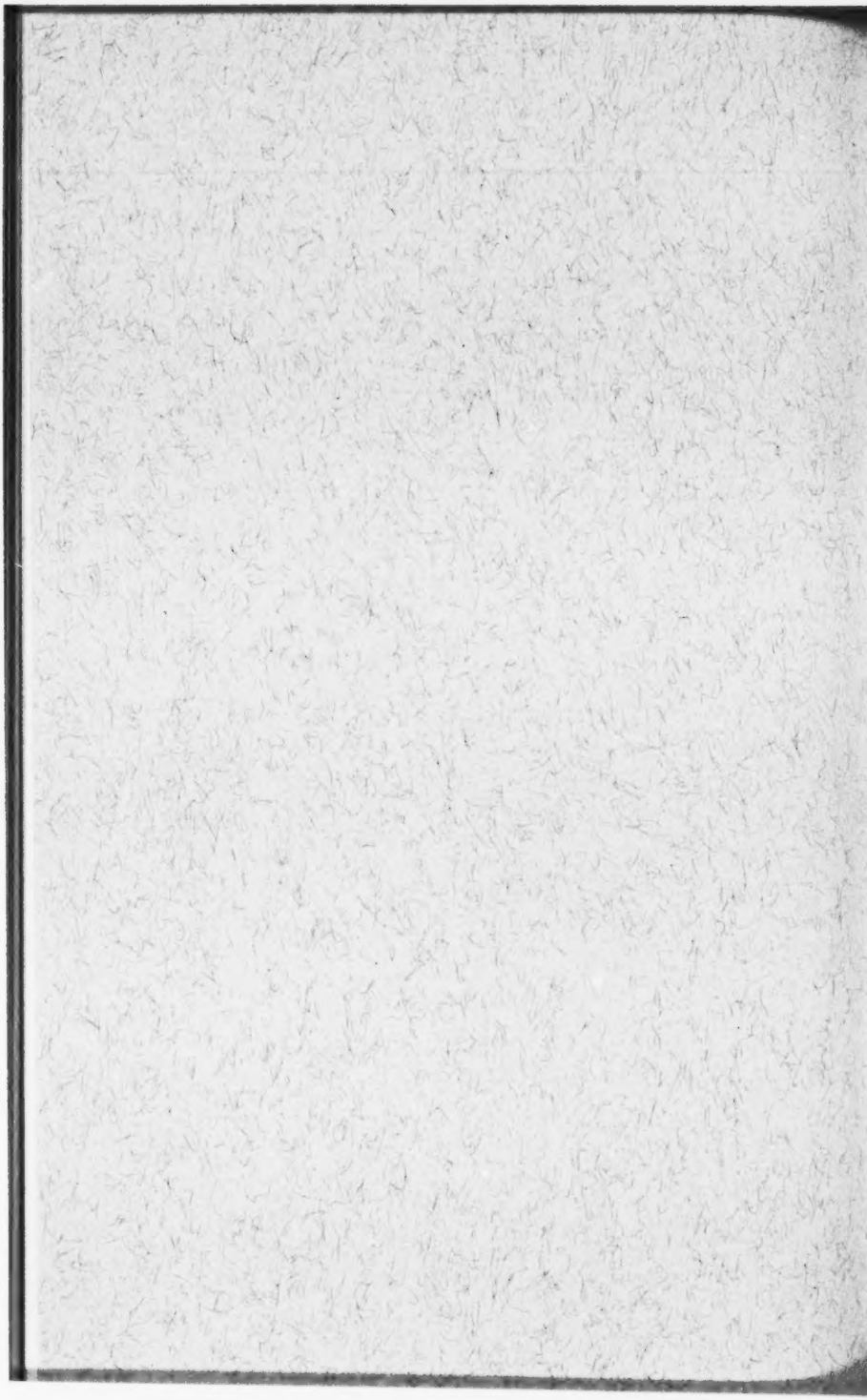

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MARY S. WHITMORE, ROBERT SIMPSON, LOUISE FILLEBROWN MURTAUGH AND SUE M. STROUS, EXECUTRICES OF THE ESTATE OF HENRY ROSE, DECEASED; EDWARD L. MCKENZIE, PEOPLES PITTSBURGH TRUST COMPANY, EXECUTOR OF THE ESTATE OF C. LOUIS MCKENZIE, DECEASED; FAYETTE A. MCKENZIE, JOHN SIMPSON AND LILLY S. CULVER, THE NEXT-OF-KIN OF MARION S. SIEMENS, DECEASED; *Petitioners,*

VS.

THE PENNSYLVANIA SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS, A CORPORATION, *Respondent.*

REPLY BRIEF FOR PETITIONERS.

Respondent's Brief charges that the Petition contains "erroneous" statements which "carry a false implication" (Br. 22), and from this premise states what it *implies* is a "Statement of the Case." This charge, coupled with numerous misrepresentations of the record and with a method of argument designed to confuse and mislead this Court, instead of presenting the issues upon Federal questions with "studied accuracy, brevity and clearness" to show "the real situation," as required of "counsel for *both*

sides" in *Furness Withy & Co., Ltd.*, v. *Yang Tsze Insurance Co., Ltd., et al.*, 242 U. S. 430 (433-4), compels petitioners to reply.

Reply to Respondent's Statement of the Case.

Respondent's "Statement of the Case" (Br. p. 3-7) is, with a few misleading characterizations, but a partial statement of the docket entries (R. 1a-10a). It fails to point out any *inaccuracy* or *omission* in the Summary Statement of the Petition as required by Rule 27(4) of this Court, hence by the oblique method employed, tacitly concedes the correctness of the Petition's presentation of facts. The purpose of some of its implications to lay the ground work for further misrepresentations and misleading statements in its "Argument" will be apparent from this Reply to respondent's "Argument."

Reply to Point 1 of Respondent's Argument.

Point 1 is captioned "The Proceedings in the Orphans Court of Tioga County." It consists of a prefatory statement which misrepresents the prescribed procedure and practise (Br. 8), and five sub-heads (a-b-c-d-e, Br. pp. 9 to 17) which, for the most part, do not contain *argument* but merely reiterate with slightly different phrasings the misleading statements previously set forth in its Statement of the Case,[1] and *imply* that they recite the salient facts in the proceedings in administration in this estate relevant to consideration of the Federal questions here. Thus, the method employed is to first give an innocuous statement of the case, then misstate the prescribed procedure and practise, and upon this false premise, to imply by recitals under

[1] Compare: ¶ 3 p. 3 with ¶ 1 p. 9 and note variance in dates re appointment of auditor; ¶ 3 p. 4 with ¶ 4 p. 9 and note variance in dates of second account; ¶ 4 p. 4 with ¶ 5 p. 9; ¶ 5 p. 4 with ¶ 1 p. 10.

the sub-heads, that the steps taken in administration were in accordance with the prescribed procedure and practise.

The prefatory statement (Br. p. 8) cites with care the *Orphans Court Act*, which is the Act dealing with the *subject matter* of such Courts jurisdiction. But it significantly fails to even mention the *Fiduciaries Act*, Act of June 7, 1917, P. L. 447 (Purdon's Statutes, Title 20, Sections 321 et seq.), which is the Act prescribing the proper *procedure* in Orphans Courts. The Rules of Equity Practise of Pennsylvania prescribe the practise in Orphans Courts.

The significance and importance of a correct understanding of the proper procedure as prescribed in the *Fiduciaries Act*, as related to the Federal questions raised in the Petition, relate to steps actually taken in the *initial* proceedings in administration which constitute the *conditions and circumstances* under which the Court later, when construing the residuary clause, took judicial notice contrary to the law of the land. Petitioners' position as set forth in their Petition is that the Court could not take judicial notice as a subterfuge to by-pass the impediment of a recognized rule of law which the Court conceded made evidence inadmissible to establish the alleged fact judicially noticed; and that it could not take judicial notice where there was doubt; and that it could not take judicial notice to establish the main fact in issue; and that by the failure of the sole Judge of the Orphans Court to observe the prescribed procedure and practise in those initial steps in administration taken before petitioners received notice or knew what was being done, the Court conclusively showed that it had great doubts and that it recognized the ambiguity in the residuary clause as *patent*.

Under Section 46(f) of the Fiduciaries Act, the Court was *prohibited* from confirming an account until the *Notice* prescribed in Section 46(e) had been given, and this prohi-

bition applies to all Orphans Courts. Section 46(e) provides:

> "When any of the heirs—reside out of this State—or from other circumstances it may be expedient that additional or further notice (to advertisement) should be given—it shall be in the discretion of the Orphans Court to require such further or additional notice—to appear in Court or before the auditor—for the *examination* of the account or *distribution* of assets."

To exercise this discretion judicially, rather than capriciously, the Court must look into the Will and any other matters disclosed by the files and records in the estate when accounts are *presented*—to ascertain those *basic conditions* inherent in the estate germane to its consideration in discharging the *duties* correlative to the power in exercising discretion as to notice.

The records and files showed that there was a residue of Individual Estate and also a Trust Estate of nearly $400,000.00. *In addition* to the question of ambiguity because of the naked abbreviation in the residuary clause, *other* provisions of the Will and Codicils and the provisions of the Federal Estate Tax Law, *demanded prompt judicial construction of the residuary clause to determine identities of those entitled to residue and trust estate in order that such parties might be heard upon construction of these other provisions and in order to file a lawful return on Federal Estate tax.*

Thus, the Will gave "$25,000 in bonds of good value bearing at least 4%" (R. 10a). This was obviously a gift of bonds at *par,* as ultimately construed (R. 152a-153a). Who had the right of *selection?* The legatee, the executors, or those entitled to residue? Certainly the latter must *be heard* upon the question of who had the right to select. And they must be identified before they could be heard.

The Will gave a $10,000 contingent gift (R. 11a) and a Codicil admonished against payment of excessive Executors' commissions, thus "only the usual single fee" (R. 18a). Construction of both of these provisions directly affected the value of residue, and *whoever* was entitled to residue must be *identified* in order to be *heard* thereon.

So much of the estate as might pass to charity would be exempt in determining net estate subject to Federal Estate tax. Whether the residue and/or trust estate passed to charity would determine both the amount and rate of such tax. Some specific and pecuniary legacies were given tax-free, whereas others were tax-burdened (R. 10a and 20a). And it would be impossible to make distribution on the tax-burdened legacies until the rate of tax was determined.

Thus, it would be impossible for Executors to liquidate any bonds in the Individual Estate (their chief task) or to distribute the contingent legacies, or any of the tax-burdened legacies; or to receive any commissions and the court itself later conceded on exceptions that in order to make a proper and lawful determination on Federal tax or pay such tax, it was "necessary" to have judicial identification of whoever was entitled to residue and trust estate (R. 477).

These were the basic conditions inherent in the estate at death.

The first accounts showed when presented to the Court that most bonds had been liquidated without any selections having been made (R. 43a); that the contingent gift had been paid and was charged to expense (R. 41a) instead of being shown in its proper place under the "distribution account" (R. 42a); and the Court approved the payment by Executors to themselves, before confirmation, of commissions in excess of the established standards, and in face of the admonition against excessive commissions in the first Codicil (R. 18a), all without notice to petitioners.

The distinction concerning large and small counties in the Fiduciaries Act does not relieve a Judge of his duty to see that proper Notice is given upon "presentation" of an account, *before* the account is *examined* in open court, much less confirmed.

These basic conditions here detailed were apprehended in the Petition where it says that construction of the residuary clause was deferred "notwithstanding an early adjudication was *necessary for proper administration*" (Pet. 5). This statement, we submit, in the light of the unquestionable inherent conditions as above delineated, was a modest statement made "with studied accuracy, brevity and clearness." If it were to be challenged by respondent, it should be pointed out definitely instead of resorting to the oblique method of misrepresenting the law upon the proper procedure and practise, thus compelling petitioners here to burden their Reply with such lengthy details.

In reply to sub-head (b) under Point 1, what has already been shown discloses the irregularity of having the proceeding to construe the Will follow, rather than precede, the confirmation of the accounts. The Record discloses that although the other provisions of the Will and Codicils were construed, construction of the residuary clause was deferred (R. 132a-180a) at the request of counsel for Executors (R. 86a-87a), who also appeared for respondent and the other Animal Society claimant (R. 91a-92a), upon the pretext that a Federal Estate Tax Return could not be filed and the tax paid at the time (R. 86a-87a), when in fact on that very day, January 20, 1941 (R. 78a) the Return had been filed and tax thereon paid (R. 212a) by Executors, accompanied by a misleading affidavit (R. 72a and see Instructions 70a-71a) of no contest when they actually knew that two Societies each claimed the residue (R. 91a, 92a).

Under sub-heads (d) and (e) of this section (Br. pp. 10-17) respondent gives its version of the hearings which com-

menced on January 29, 1942, in the Orphans Court. Respondent would have this Court believe that its position was that if the Orphans Court should refuse to take judicial notice that the abbreviation "Penna. S. P. C. A." meant respondent, or that respondent's evidence failed to establish its identity under that abbreviation, that the next-of-kin (petitioners) had no standing to claim the residuary estate as it was a bequest to "charity". Such a contention is not only denied by the record, but the obvious attempt to inject the "charity" question into the case here, tacitly shows respondents' lack of confidence in sustaining the state courts upon the grounds of their decision. The fact is that counsel for respondent conceded to the Orphans Court that there could be no bequest predicated upon the theory of charity in this case unless it was first established that the abbreviation stood for the name of respondent. Thus, at the opening of the hearing on January 29 the charity argument of respondent was laid to rest in the following manner (R. 257a):

> "By Mr. Clark" (Counsel for respondent): "And third, we shall show by the adjudicated cases, that a Society for the Prevention of Cruelty to Animals, and therefore this Society, or any other, is a charity, and under the will and decisions following the Act of 1855 and its amendments, the heirs have no standing to question the legacy."

After Mr. Clark stated his proposition he then argued to the Court (R. 265a):

> "* * * As to the third point, I don't intend to argue long. If the meaning of the words 'S. P. C. A.' once is conceded to be The Society for the Prevention of Cruelty to Animals, then that is a charitable bequest, and whether we or any one else are entitled, the heirs have no standing to question it."
>
> "By the Court: Aren't you arguing in a circle?"
>
> "By Mr. Clark: In a way."

"By the Court: If the identity is established, it belongs to your client."

* * * (R. 266a):

"By the Court: I am assuming that The Pennsylvania Society for the Prevention of Cruelty to Animals is a charity. Now until you establish that The Pennsylvania Society for the Prevention of Cruelty to Animals is the object of this bequest, *then you haven't established it is a charity.*"[2]

"By Mr. Clark: You are entirely right. * * *"

Respondent never again mentioned charity at any time during the proceedings. In answer to exception 43 of petitioners, the Orphans Court found (R. 452a):

> "There is nothing in the Will or Codicils to imply or impute a charitable use to the residuary estate, apart from an inference *predicated wholly and entirely upon the prior identity of a residuary legatee as one whose powers and purposes are purely and solely charitable.*"

In view of the record in this case, we again assert, as we asserted in the Petition (Pet. p. 23), that the argument predicated upon a "charity" of respondent (Br. pp. 11, 12) is specious and is an attempt to lift the case by its proverbial "boot straps".

In this section of respondent's argument, respondent takes the position that it offered the evidence described on pages 13 through 15 of its Brief, not only to inform the mind of the Court and to assist the court in taking judicial notice, but as affirmative proof and would have this Court believe that such evidence was actually admitted in evidence and was not subject to the provisional ruling of the Orphans Court reserved throughout the hearings, which commenced on January 29.

We make the flat statement that every exhibit listed on

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[2] Italics ours unless otherwise indicated.

pages 13 through 15 and the exhibits described at the bottom of page 17 of respondent's Brief were all provisionally received by the Orphans Court (R. 266a, 267a, 269a, 274a-278a, 287a, 297a-298a). All of this so-called "evidence" was taken *provisionally* by the Orphans' Court with a clear understanding that it would later announce whether or not this evidence, and any other evidence offered by respondent, was admissible. The court even went so far as to state that when it announced its decision, if it should decide the evidence was inadmissible, it would strike it from the record.

Counsel for petitioners at the opening of the hearings (R. 266a) made it perfectly plain to the Court that petitioners objected to the introduction of any evidence on behalf of the claimant, and requested an offer of proof. The court granted the request for an offer of proof and respondent offered to prove that it was the legatee designated in the residuary clause, and that it was frequently referred to as "Penna. S. P. C. A." and made such offer "solely for purposes of identification" (R. 267a). Whereupon the court ruled that it could not allow any proof that respondent was the beneficiary intended, but that the court would allow respondent to produce evidence concerning the identity of respondent, ruling that such evidence would be received under objection and with the understanding that the court would rule upon its admissibility "on review" and when it made its decision if the evidence was improperly received it would be stricken from the record (R. 267a).

It is perfectly plain of record that this provisional ruling of the court was made applicable to all evidence offered *by respondent* because counsel for petitioners asked that it be "understood for the record that the general objection * * * to this testimony * * * to the introduction of *all* this testimony * * * applies to each and every

question' and the Court ruled it was so understood (R. 269a).

After listing as *in evidence* the exhibits offered at the hearing on January 29, respondent argues (Br. p. 16) that the conclusion of that hearing shows that the case was concluded and closed. That statement is not borne out by the record because a further hearing was held on February 21, 1942, at which time *further* testimony was taken and the court ordered the taking of certain depositions (R. 308a-310a).

Respondent further argued (Br. p. 16) that because it was stated at the close that day of the hearing of January 29, by petitioners' counsel "We have no more evidence" that petitioners recognized that the case was concluded. As we have demonstrated above, that certainly is not the case and the statement of petitioners' counsel, which was clearly understood by the parties and the court at the time it was made, merely meant that they had no further testimony to present in the then-stage of the proceeding. The hearings certainly were not closed. Further hearings were held on February 21 (R. 307a) and March 7, 1942 (R. 316a) and without motion to reopen. A mere reference to the docket entries (R. 5a) will demonstrate that the hearings which commenced on January 29, 1942, were open up to the very day of the court's adjudication *nisi*.

Moreover, it is perfectly plain that all parties considered the hearings open, as a stipulation (R. 328a) was filed on the very day the court entered its adjudication (R. 5a), and still without any motion to reopen.

The fact that the Trust Instrument was never introduced, or that the trust estate was never mentioned at any of the three hearings held in this proceeding, clearly shows that no one regarded the case as concluded.

Another fact which demonstrates clearly that the parties realized that the hearings were open, is that under the prac-

tice of the Orphans Court, before an adjudication *nisi* is entered, Requests for Findings of Fact and Conclusions of Law are filed with the trial judge. Yet neither side had filed such requests as of the date the court filed its adjudication *nisi*. That petitioners were taken completely by surprise is borne out by the fact that on the following Tuesday, March 17th, they petitioned to annul the adjudication *nisi* (R. 358a-364a) and pointed out that the court had specifically reserved decision upon the admissibility of respondent's evidence and until the court ruled upon the admissibility of that evidence, and whether or not any evidence would be received, it was not incumbent upon them to offer any evidence. Petitioners asked the right to put in evidence in support of their case, and further asserted that even if the court should deem that it was justified in taking judicial notice, still the next-of-kin must have the right to be heard upon what inferences could be drawn from the exercise of judicial notice (R. 359a-360a-361a). Specific offers of proof were made in support of petitioners' demand to be heard (R. 363a-364a). The court, as we pointed out in our Petition, denied the petitioners any right whatever to put in any evidence upon the theory that once the court took judicial notice, it would not receive evidence contrary to the inferences drawn *by the court* from that judicial notice (R. 366a), *and this, notwithstanding the fact, that the court "used" the evidence offered by respondent to inform the mind of the judge, which very evidence the court held was "inadmissible"* (R. 366a). On the announcement of this "unique" decision, petitioners vainly, by timely motions, again sought the opportunity to be heard, which culminated in the trial court holding open all findings of fact or conclusions of law and all errors, omissions and questions with reference thereto for determination upon final adjudication (R. 370a).

Thereupon petitioners filed their exceptions to the action of the trial court, pointing out that the decision was based upon an incomplete record as evidence had not been received under the offers of proof made by petitioners, that the Trust Instrument attempted to be construed was not in evidence and therefore its provisions could not have been lawfully known to the court, (R. 428a-430a, 431a), and that the actions of the trial court had deprived petitioners of due process of law (R. 435a-436a).

These Federal questions were assigned as errors (R. 499 to 505), and argued in the Supreme Court of Pennsylvania but were ignored by that court in its opinion.

Reply to Point 2 of Respondent's Argument.

In this section of its Brief (Br. pp. 17-21) respondent argues that petitioners had full opportunity to be heard in the Orphans Court. In the light of what has been pointed out in the Summary Statement of our Petition and our reply *supra,* to other sections of the respondent's Brief, little need be said in reply to this contention. The facts in this case show that the question of the admissibility of any evidence concerning the ambiguous residuary clause here involved was not ruled upon by the trial court, but was reserved for decision after review. Throughout proceedings which were open up to the very day the court announced its adjudication, it had announced no decision on the reserved question of law. Counsel for petitioners, in all honesty, withheld their proofs which would have emphasized the patency of the ambiguous residuary clause, until the court ruled on the question of whether any proof was admissible. The announcement of the court on the "admissibility" of any evidence was made in its adjudication *nisi* of March 14, 1942. And instead of ruling squarely on the question of the admissibility of evidence, the court

took the novel position that it could use respondent's evidence *even though inadmissible*, to inform the mind of the *judge*, and being thus "informed," could then judicially notice the ultimate fact in issue in favor of respondent, and could deny to petitioners the right to produce any evidence either to inform the mind of the judge, or concerning the ambiguous residuary clause, or to rebut the evidence offered by respondent, or to explain or rebut the inferences to be drawn from the exercise of judicial notice. Such a situation, in our opinion, involves a decision based upon an improper and incomplete record, a denial of a fair trial, and a denial of due process of law to petitioners.

In such a situation, we think little need be said of the argument of respondent that petitioners were afforded "full opportunity to be heard." We submit that the converse is true, and, in fact, petitioners were afforded no opportunity to be heard.

This aspect of the case is fully covered by the decision of this Court in the case of *Ohio Bell Telephone Co.* v. *Commission*, 301 U. S. 292. While this case is cited by respondent in support of its position, we submit that it squarely upholds the right to certiorari here and requires a reversal of the courts below. In the *Ohio Bell Telephone Co.* case, the Commission did precisely what the Orphans Court did in the case at bar and utilized judicial notice to support the findings made by the Commission adverse to the Telephone Company. In the *Ohio Bell Telephone Co.* case, as basis for an order requiring the Telephone Company to refund to its patrons excess earnings collected during a series of years, the Commission valued the Company's property for each of those years by applying to the value in an earlier year, which it had determined on hearings, price trend percentages, derived through judicial notice from evidence which had been provisionally received. As pointed out by this Court (p. 296) the Commission for valuation purposes

"took judicial notice of price trends during those years", and, as in the case at bar, the first warning from the Commission that it would exercise judicial notice in connection with such facts came with the filing of its report. In the case at bar, the first warning that the court would exercise judicial notice of the ultimate fact in issue came with the filing of its adjudication *nisi*.

In the *Ohio Bell Telephone Co.* case, as in the instant case, the Company protested and moved for a re-hearing and asked the opportunity to explain the facts judicially noticed and to rebut them. As here, the Company was denied the opportunity to explain and rebut the facts judicially noticed. This Court held (pp. 299-300), in the *Ohio Bell Telephone Co.* case, that the demand of the Telephone Company for the opportunity to explain and rebut the facts judicially noticed by the Commission was a "timely and adequate assertion of the infringement of the petitioners' rights under the Fourteenth Amendment."

It was argued that the decision of the Commission could be upheld and the Supreme Court of Ohio had upheld the decision on the theory that it could be sustained "as an instance of judicial notice" (301 U. S. 300). This Court rejected that contention in no uncertain terms and pointed out (p. 301) that this Court's "opinions have been much misread if they have been thought to point that way." This Court then squarely ruled (p. 301) that judicial notice even when exercised "has no other effect than to relieve *one* of the parties to a controversy of the burden of resorting to the usual forms of evidence" and further (pp. 301, 302) "it does not mean that the opponent is prevented from disputing the matter by *evidence* if he believes it disputable."

In conclusion, this Court pointed out that to press the doctrine of judicial notice to the extent attempted in the *Ohio Bell Telephone Co.* case, and we submit in the instant

case, (p. 302) "would be to turn the doctrine into a pretext for dispensing with a trial."

As this Court pointed out (p. 302) in the *Ohio Bell Telephone Co.* case, judicial notice seems to have expanded "beyond reasonable limits" and from a standpoint of due process, all facts upon which an exercise of judicial notice is based, must be *in evidence* in order to protect the individual against "arbitrary action."

The conclusion we draw from the decision of this Court in the *Ohio Bell Telephone Co.* case, is that if judicial notice is to be exercised and facts thereon found, then all facts of both sides upon which the exercise of judicial notice is predicated must be in evidence, otherwise hearings and appeals could be no more than empty forms, as no one could determine upon what the exercise of judicial notice was based. We submit that this Court has "served notice" upon our courts that judicial notice is not to be perverted into a substitute for trial.

In the instant case, the Orphans Court announced in its adjudication *nisi* on March 14th *for the first time* that while it would not receive evidence generally, that it would receive respondent's inadmissible evidence to inform the mind of the judge and would then judicially notice the ultimate fact in issue. We say that such a practice is condemned as a denial of due process by this Court in the *Ohio Bell Telephone Co.* case and in the case of *Shapleigh* v. *Mier,* 299 U. S. 468.

Reply to Point 3 of Respondent's Argument.

It would serve no point to discuss this section of respondent's argument. The one case cited dealing with abbreviations, *Gilman* v. *Sheets,* 78 Iowa, 49, 43 N. W. 299, actually supports petitioners' contentions.[3]

[3] For other cases dealing with abbreviations and judicial notice see: *Stein* v. *Meyers,* 253 Ill. 199; *Accola* v. *Chicago, Burlington & Quincy Ry. Co.,* 70 Iowa 185; *Van Heusen* v. *Argenteau,* 194 N. Y. 309.

Reply to Point 4 of Respondent's Argument.

This section of respondent's Brief argues that no Federal question is presented. After making that bold statement, no attempt whatever is made by respondent to uphold it except to cite certain cases which have no bearing on the questions here involved. In the instant case, the Federal questions here presented were raised as soon *as they came into being* in the trial court. Exceptions thereon were duly filed and assignments of error thereon were duly made in the Supreme Court of Pennsylvania. In the face of such a record, we can well appreciate why respondent makes no attempt to sustain its "assertion" that no Federal questions are presented in this case.

Reply to Point 5 of Respondent's Argument.

In this section of respondent's Brief (Br. pp. 22-26) respondent charges that "many of the statements in the Petition are erroneous and carry a false implication." Respondent then cites certain statements from the record which it contends supports this serious charge. We submit that the charge is unfounded as we will now demonstrate by the record.

Respondent refers to a statement on page 7 of the Petition which reads:

> "When the court announced it would consider evidence petitioners then asked to be permitted to put in evidence on their own behalf and on rebuttal (without petitioners abandoning the rights reserved on their exception that no evidence was admissible as the ambiguity here involved was patent)."

Respondent then states that from this statement it would appear that petitioners asked and were not permitted to introduce evidence as to the meaning of the residuary clause at "the hearing" and then argues that the record shows the

contrary, citing a statement (at R. 308a) of petitioners' counsel, "We have no more evidence", and a further statement that an attorney for one of the petitioners desired to enter his appearance "in the record while it is open."

As we have pointed out earlier in this Reply, there were in fact *three* hearings. At the hearings, which *commenced* on January 29, 1942, petitioners withheld their evidence which would emphasize the patency of the ambiguous residuary clause and the circumstances surrounding the making of the Will in question, because there was no point in even offering such evidence until the court ruled on the basic question involved in the case of whether *any* evidence was admissible and whether the evidence offered provisionally by respondent was admissible. The record clearly shows that the court reserved its ruling on this vital question and advised petitioners that it would announce its ruling on the reserved question after a review of the evidence, respondent's whole case, and if it determined such evidence inadmissible it would be formally stricken from the record. In such a situation petitioners were open to the very day the court announced its decision know what, if any, evidence of respondent they would be required to meet. Thus, if all of respondent's evidence were stricken, and the ambiguity was held patent, all questions would have been resolved without any evidence whatsoever from petitioners and a decision in their favor would automatically follow.

It is perfectly plain from the record that the hearings were open to the very day the court announced its decision *nisi* and that that decision *itself* raised the Federal questions here involved. Within three days after the announcement of the court's decision, petitioners petitioned to annul the adjudication *nisi* (R. 361a) and filed supporting offers of proof. And the court did *thereupon* rule that it would not receive petitioners' evidence and that

it would have been rejected in the first instance if offered. But it nevertheless took the position that it would receive and consider respondent's evidence, and *thereupon* ruled again that it would judicially notice that the abbreviation meant respondent (R. 366a). We submit the statement on page 7 of our Petition is an accurate statement of what the record discloses.

Respondent criticizes (Br. p. 24) another statement on page 7 of the Petition which alleges that petitioners' position was that until the court ruled whether any evidence would be admitted they would withhold all evidence to emphasize the patency of the ambiguous residuary clause. We submit that petitioners' position was plain and was clearly pointed out to the Orphans Court in their petition to annul the adjudication *nisi* which adjudication contained the *first ruling* on the admissibility of any evidence in this case (R. 358a-362a). Of course, the petition to annul the adjudication was filed after the court filed its adjudication *nisi*. We do not understand how any one could have raised any Federal questions prior to this time, as they did not arise in the case *until the filing of the decision and adjudication nisi on March 14, 1942.*

Respondent makes the further statement (Br. 25) that an examination of the notes of the testimony shows that there was no question reserved by the court, except the right to strike out evidence received which the court might later determine to be inadmissible. We submit that this statement is highly misleading. The fact of the matter is that the admissibility of any and all evidence of respondent was taken under advisement by the court with the announcement that it would later determine on review of respondent's whole case whether the evidence was admissible or inadmissible, and if inadmissible would strike it from the record. The adjudication *nisi* contained the

first announcement by the court that related in any way to the admissibility of any evidence whatsoever in this case.

Respondent questions (Br. p. 26) th estatement of petitioners that the Orphans Court recognized that the residuary clause here involved was ambiguous. We submit that one cannot read this record, particularly the opinions of the Orphans Court, without arriving at the conclusion that the court was of the opinion that this was an ambiguous residuary clause. The ambiguity in the residuary clause delayed distribution in this case even before petitioners sought a construction of the Will and that ambiguity colors every action taken by the Orphans Court in this case.

A further statement made in this section of the argument (Br. p. 26) is that there is nothing in this record to show that the judge and the respondent agreed with each other that there was nothing in the Will upon which to predicate a charitable use. Let us see if there is such an "agreement" in the record:

Respondent's sole argument concerning the "charity" contention appears on pages 265a and 266a of the record. There respondent's counsel said:

> "If the meaning of the words 'S. P. C. A.' once is conceded to be The Society for the Prevention of Cruelty to Animals, then that is a charitable bequest and whether we or any one else are entitled, the heirs have no standing to question it."
>
> "By the Court: Aren't you arguing in a circle?"
> "By Mr. Clark" (counsel for respondent): "In a way."
>
> * * * * * * *
>
> "By the Court: I am assuming that The Pennsylvania Society for the Prevention of Cruelty to Animals is a charity. Now until you establish that The Pennsylvania

> Society for the Prevention of Cruelty to Animals is the object of this bequest, then you haven't established it is a charity."
>
> "By Mr. Clark: You are entirely right. * * *"

If this is not an *agreement* between the judge and counsel, that there is nothing in the Will upon which to predicate a bequest to charity, then it is a little difficult for us to understand the English language. In keeping with this agreement, the court squarely held (R. 452a) that there is nothing in the Will or Codicils to imply or impute a charitable use.

Petitioners pointed out in their Petition that the trial court actually awarded *nisi* a trust estate of $396,448.21 (Pet. 4, 7-8, 13, 18-19) to respondent, without the trust instrument being in evidence or before the court, *without* the court having *read* the trust instrument, and without petitioners being heard thereon. Nowhere does the respondent deny the correctness of that statement. Respondent's "Argument" *does not even mention the trust estate.* The sole reference thereto is in the last two paragraphs of its "Statement of the Case" which does not even imply a challenge to the correctness of the Petition, but significantly says (Br. pp. 6-7):

> "* * * The Orphans Court *of Philadelphia County* * * * awarded the *balance* to * * * executors, to be segregated from her individual estate and accounted for by them as a separate fund. *The* Orphans' Court held that this trust fund passed under her will as a part of her estate. *This holding was made and an opinion filed on motion of the next of kin to open the adjudication* (R. 367a)."

Thus, if the Court is to believe respondent's Brief, this holding was "irregular" (Br. p. 23) because made after the hearing was "concluded" and with no evidence whatsoever before the court concerning the trust estate.

The Philadelphia Court made no award of the trust estate to the executors to be administered as a part of the residuary estate, which is the inference respondent is attempting to have this Court draw from its Statement of the Case. The Philadelphia Court, on the contrary, awarded *custody only* of the trust estate to the executors, expressly providing that the trust estate was not to be commingled with the general residuary estate, as its order provided that the trust estate was "to be held segregated from her individual estate and accounted for as a separate fund" (R. 23a).

In its adjudication *nisi*, the Orphans Court of Tioga County had "tucked away" into Finding of Fact No. 3 the statement that the trust estate (R. 332a):

> "upon her death became part of her general estate. No question as to the status of the trust fund arises here, as all the assets therein have been *awarded* to and are in the hands of the executors as such."

As there had been no award of the trust estate prior to the adjudication *nisi*, petitioners pointed that fact out to the court and challenged this "holding" in the adjudication *nisi* (R. 361a).

The Orphans Court of Tioga County, realizing that petitioners' contentions concerning the trust estate were well taken, then *changed its position* by attempting to impute that the "award" meant by that court in its adjudication *nisi* was made by the *auditor* (R. 367a) and then said, *without the trust instrument ever having been introduced in evidence*, that it provided that

> "* * * at her death (trust) to be distributed to such persons as she should by will appoint. She *made no appointment* and the trust * * * *therefore* on her death passed under her will * * *" (R. 367a).

Petitioners then pointed out to the court that the position that an award had been made by the auditor was untenable,

as the auditor has specifically refrained from attempting to determine what comprised the "residue" of decedent's estate and merely "felt" that it would be expedient to combine the trust account and the account on decedent's individual estate without any pretext of making an award to the parties entitled (R. 136a).

On the holding of the court that decedent *did not include the trust estate* in the terms of her Will, petitioners are entitled to that trust estate.

Accordingly, exceptions on this aspect of the case were duly filed and in response to Exception No. 7 (R. 478-479) the court changed its position again and pitched its entire holding on the order of the Orphans Court of Philadelphia as an "award" of the trust estate. Such a position is untenable, as we have shown. The result is that the Orphans Court, no matter on what theory it pitched its "adjudication," did so without the trust instrument ever having been introduced in evidence and without petitioners ever having been heard thereon. In fact the court in its attempt to sustain its initial action, actually switched its grounds from "pillar to post", and respondent shows its recognition of this condition in the poignancy of the last sentence of its "Statement of the Case" (Br. p. 7).

The singular silence of respondent's Brief upon the unconstitutional manner in which the Orphans Court awarded the trust estate to respondent, and its similar silence concerning respondent's collusive collaboration with the Women's Pennsylvania Society for the Prevention of Cruelty to Animals, to eliminate the patent ambiguity here involved, as alleged in the Petition (pp. 16-17), concede the weaknesses of respondent's case.

Conclusion.

In conclusion, it is submitted that this case involves substantial Federal questions; that those questions are im-

portant and go to the very root of our constitutional concepts of a fair trial and due process; that those questions were timely raised and should be decided by this Court in the public interest to preserve the purity of our Judicial system, and that the Petition for a Writ of Certiorari should be granted and that the decision of the court below should be reviewed and reversed.

Respectfully submitted,

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